SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940.

No. 443

CLARA E. HARE, ET AL., PETITIONERS,

VS.

ALLEN W. HENDERSON, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AT NEW ORLEANS, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Charles Evans Hughes, Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioners respectfully present this Application for Writ of Certiorari in the above entitled cause to the United States Circuit Court of Appeals for the Fifth Circuit; and for grounds thereof, show the following:

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

Petitioners filed this suit in the Federal Court at Beaumont on the 17th day of June, 1938; and on January 5, 1939, amended their pleadings on which the case was heard (R. 1).

The suit was to recover the title and possession of 640 acres of land in Orange County, Texas.

As alleged in plaintiffs' amended petition, the claim of title was a deed from defendants' parents, dated October 11, 1902, to Frank Mills, reciting $6,717.00 paid in cash, and the reservation of a vendor's lien to secure a note for $2,783.00; and a deed dated October 24, 1912, from Mills to plaintiff Clara E. Hare, then Clara Brown.

The vendor's lien notes, petitioners alleged "became barred and extinguished, with the equitable lien which secured it four years after its due date, on October 11, 1905, and that thereafter all claim or right arising out of such promissory note as affecting these plaintiffs' purchase of said land, became extinguished under the statutes of four years limitation, which are here pleaded in bar of any claim as having been assertable against this land by the defendants' parents, or by themselves.

"Moreover while said transaction, as hereinbefore stated, was barred against any right to enforce such equitable vendor's lien against this land in the hands of your plaintiffs, if such lien had been an express contractual lien whereby any right of the original vendors could exist against this land, such assumed or presumed superior right, title or claim became extinguished and conclusively established as matter of law as having been terminated, annulled and stripped from all right, interest or claim by the said original vendors and their heirs under the Acts of the Legislature of the State of Texas of 1913, and under the Acts of 1911, and the laws of the State of Texas established in the Code of 1925, as well as all succeeding legislative provisions, not only barring such claims by limitations, but terminating and destroying them as incumbrances or stale claims upon the lands in the hands of vendees as against assertions of claim and ownership on the part of

vendors. And in this connection, the plaintiffs invoke the statutes of limitations as provided in the aforesaid Acts as a complete bar to any such claims if such are asserted against the plaintiffs by the defendants, or any of them, in this suit" (R. 14).

And petitioners also in the alternative offered to do equity by tendering the amount of the vendor's lien notes, as follows:

> "If, however, for any reason the defendants, or any of them, are allowed in this proceeding to assert against the plaintiffs any right, title, interest, claim or demand growing out of or incidental to, or inherent in, the before mentioned transaction, and if such claims are allowed to be asserted against these plaintiffs in this proceeding upon any ground, legal or equitable, and any condition be imposed upon these plaintiffs growing out of the same to pay any part or parcel of said deferred payment provided in Mills' note to the Hendersons, then, and in such event, these plaintiffs here tender and offer to do equity" (R. 14-15).

Among other defenses, respondents pleaded a rescission of the sale and deed made by their parents to Frank Mills, as follows:

> "That on, to-wit, November 14, 1914, suit was instituted in the District Court of Orange County, Texas, in the county where said land was located, by said Guardian and by the said Allen W. Henderson, to evidence a rescission, which rescission had already taken place, and which suit also in legal effect amounted to a rescission of said contract of sale, represented by said deed, which land had not been paid for, and in such action, on, to-wit, November 26, 1915, judgment was rendered in favor of said plaintiffs, being the defendants for whom this answer

is now filed, against the said Frank Mills" (R. 21-22).

And set out in full said judgment.

And in this connection further pleaded, as follows:

"That such judgment has been duly recorded in the deed records of Orange County, Texas, and is in all respects a valid judgment.

"That thereafter these defendants paid up the delinquent taxes upon said land, and have since paid taxes thereon, have claimed the land as their own, have sold timber therefrom, have leased the land, have had possession thereof by virtue of the cutting of timber therefrom, and other possession, each and all of which acts, including the institution of said suit, amounted to a rescission of said contract, under which plaintiffs purport to claim, and for which land they never paid said defendants or any of them."

"That by virtue of the foregoing judgment title to said land has been decreed to be in these defendants, as against plaintiffs, and their predecessors in title, and same is here now plead to be *res adjudicata* of all issues involved in this law suit" (R. 24).

And they further specially denied the pleas of limitation in plaintiffs' petition; and further denied that the laws of limitation set out therein were applicable (R. 24).

The case was heard by the court without a jury; and decided by judgment entered on February 2, 1940 (R. 42); which judgment was pursuant to findings of fact and conclusions of law, filed at the same time (R. 30-42).

As said in the opinion of the Circuit Court of Appeals:

"The District Judge, on full findings of fact, sustained the defense of rescission and abandonment,

and gave judgment for defendants. Plaintiffs, appealing, insist that the findings do not support the judgment, but require a judgment for them." (Opinion, Record .....)

The fact findings of the District Court, on which the defense of rescission was sustained, are as follows:

"After the death of the father and mother of the above named children, S. W. Henderson was duly appointed and legally qualified as guardian of the three youngest children, the oldest child having reached his majority.

"On November 14, 1914, suit was instituted by Allen W. Henderson and the guardian of such minors against Frank Mills in the District Court of Orange County, Texas, for the land in question, and omitting the description, the following judgment was entered by such Court on November 26, 1915, pursuant to citation duly issued and served by publication" (R. 37).

(Copy of judgment omitted.)

"An attorney was not appointed to represent Frank Mills and no evidence was actually offered in the District Court and no statement of facts filed.

"After entry of such judgment an affidavit of heirship was filed by the Hendersons in 1920. An oil and gas lease was executed by the Henderson heirs in 1932 on the 300 acres of land in controversy.

"Thereafter, on March 23, 1932, these Henderson heirs executed an oil and gas lease to P. L. Howe, covering about 300 acres of this survey, and it was recorded in Orange County on July 22, 1932. It was an ordinary oil and gas lease, but was at the expiration of one year annulled and released.

"And in 1923, George H. Henderson, one of the defendants, sold to a man named Rogers about 40,000 feet of timber from this land, which he took off in about two months. The price was $190.00 cash.

"And about 1918, or 1919, he had the land surveyed, and was in there doing that work about a week.

"And in September, 1938, the defendants, Henderson heirs, leased 200 acres of the land to the Sun Oil Company for oil purposes, and received therefor the sum of $4000.00, with an additional obligation to pay within a year an additional sum of $6000.00 or forfeit the lease. The Sun Company did not pay the other $6000.00, but cancelled the lease.

"A certificate of redemption was issued to the Hendersons on August 26, 1921, by the Tax Collector of Orange County, Texas, relating to taxes for the years 1912, 1913, 1914, 1915, 1916 and 1917 and 1918, and upon the same date a similar certificate was issued covering taxes for the years 1902 to 1911, but apparently relating to one-half of the taxes due for the latter period and one-half for judgment, interest and penalties accruing for the former years and based upon judgment for taxes in cause No. 2992.

"On November 9, 1927, and February 23, 1929, tax receipts were issued to the Hendersons for payment of taxes upon this land. A tax receipt was issued on January 26, 1929, in payment of 1928 taxes. On January 6, 1931, tax receipt was issued to the Hendersons in payment for taxes due for the year 1930, and on January 12, 1932, a tax receipt was issued to the Hendersons for payment of taxes due for the year 1931.

"The certificate from the Comptroller's office at Austin, showing tax assessments of this land be-

ginning with the year 1900 and ending with the year 1918, shows the following with reference to taxes between those years:

> In 1900 J. L. Henderson, by G. T. B. Cox, Agent, assessed 640 acres.

"In 1901 and 1902, this land was assessed as unknown, and it continued to be assessed as unknown until the year 1918" (R. 38-39).

And the District Court in his conclusions of law, decided as follows:

> "The Hendersons elected to and did rescind the contract of purchase. Regardless of the legal effect of the judgment as such in the suit filed in 1914, it, coupled with the other facts, evidences an intention upon the part of the original grantors and their heirs to rescind, and as such is binding upon all parties herein.
>
> "I further conclude that the record here shows that the vendee had actually abandoned the contract, or at least had so acted as to create the reasonable belief on the part of the vendors and their heirs that she had abandoned it, and that under such circumstances the vendors and their successors were entitled to rescind without notice of their intention, notwithstanding the part performance by the vendee.
>
> *Miller* v. *Horn*, 149 S. W. 769.
> *Evans* v. *Bentley*, 29 S. W. 497.
>
> "As to the claim made by plaintiffs under Articles 5694 and 5695, Vernon's Sayles' Annotated Civil Statutes of 1914, that the lien and superior title were barred by limitation, I conclude that the Supreme Court of Texas in construing these articles, has decided that they do not affect the right of the vendor as holder of the superior legal title, but only bar his right of action thereon when affirmatively asserted by him in the courts.

"*Bunn* v. *City of Laredo,* 245 S. W. 426, holds directly that a defensive claim under the superior title such as defendants assert in this case, does not fall within the bar of these statutes.

"See also *Benn* v. *Security Realty & Development Co.,* 54 S. W. (2d) 146.

"It appearing that in the deed from Frank Mills purporting to convey the land in controversy to Clara E. Brown, now Hare, that it was expressly stated that 'It is hereby agreed and stipulated that there is a vendor's lien note against the above described property for (2783 dollars) drawing 5 per cent interest and due on or before 3 years from October 11, A. D., 1902.' That the rescission of the contract by which the Hendersons sold to Mills is binding upon Mrs. Hare, the sub-vendee, who bought with notice of the lien of the Hendersons" (R. 40-41-42).

The Circuit Court of Appeals affirmed the judgment of the lower court on the 9th day of July, 1940 (R. ....), with written opinion of the same date (R. ....).

REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

I.

Under the plain and unambiguous language of Article 5695, passed by the Legislature of the State of Texas in 1913,

> **"Those owning the superior title to land retained in any deed of conveyance,"**

where the vendor's lien notes were barred by limitation at the time of the passage of the act, were given the specific remedy of suit for the land within twelve months after the act became effective.

Which remedy, as said by Chief Justice Cureton of the Supreme Court of Texas, in construing this article of the statute in Cathey v. Weaver, 242 S. W., p. 452:

> "Is to be construed as denying to him any other remedy."

The suit was brought by the Hendersons in Orange County against Mills, who had conveyed the land to Mrs. Brown twelve years before the filing of the suit, and who was not made a party thereto.

Therefore, the judgment taken therein against Mills has no binding effect upon Mrs. Hare (then Brown), as res judicata or as evidence of notice to Mrs. Hare of any intention on the part of the Hendersons to rescind the deed which their parents had made to Mills.

And the Circuit Court of Appeals in its opinion in holding that this judgment was binding upon Mrs. Hare, as notice of an intention upon the part of the Hendersons to rescind the deed, has denied to her the protection of her property rights guaranteed to her by the due process of law clause of the first section of the Fourteenth Amendment to the Constitution of the United States.

II.

The limitation statute, Article 5695, passed by the Legislature of the State of Texas, in 1913, giving the vendor of barred vendor's lien notes the specific remedy of suit for the land within twelve months after the passage of the Act, provided:

> "Unless such suit is brought within twelve months after the act takes effect, they shall be forever barred from bringing suit to recover the same."

The Hendersons brought no suit against Mrs. Brown, now Hare, who then held the title which the Hendersons had conveyed to Mills by deed from Mills to her, dated October 24, 1902, but brought suit against Mills without making Mrs. Brown a party.

The petition in the suit alleged the residence of Mills to be unknown, and prayed for citation by publication. No attorney was appointed to represent Mills.

The judgment was taken by default, without the introduction of any evidence, or a statement thereof filed (R. 38).

Therefore, the judgment, even against Mills, was absolutely void, and was without any effect against Mrs. Hare, who was not a party to the suit, because the court had no jurisdiction of the suit to render a judgment against Mills, as suits against persons whose residence is unknown, by constructive service by publication to recover land, under the statutory law of Texas, is a special jurisdictional proceeding under Articles 2172-2175 of Chapter 23, Vernon's Sayles' Texas Civil Statutes of 1914, by which articles of the statute the court had no jurisdiction over Mills to render a judgment by default, but could only acquire jurisdiction by appointing an attorney to represent the absent defendant upon proper answer filed by him and legal evidence introduced, reduced to writing, and filed in the suit.

Therefore, the Circuit Court of Appeals in its opinion, in giving effect to this judgment as an act on the part of the Hendersons sufficient to give notice to Mrs. Hare of their intention to rescind the deed to Mills, has denied to Mrs. Hare her property rights guaranteed to her under the due process of law clause of the first section of the Fourteenth Amendment to the Constitution of the United States, and has annulled in this case the long established rule of law in the State of Texas.

III.

Under the statute, Article 5695, passed by the Legislature of the State of Texas in 1913, where the vendor lien notes were barred by limitation at the time of the passage of the act, the only remedy allowed by the statute to the vendor holding the superior title was to bring suit

against the original vendee; or, if he had conveyed, against the person holding the title under him, within twelve months, to recover the land.

This limitation statute of 1913 was expressly construed by the Supreme Court of the State of Texas, in Cathey v. Weaver, supra, as denying to the owner of the superior title, by reason of the barred vendor's lien notes retained in the deed, any other remedy, including the remedy by rescission. (Fleming v. Todd, 42 S. W. (2) 123.)

Therefore, the former remedy of rescission, before the passage of this act, was entirely abolished; and the Circuit Court of Appeals erred in holding that the judgment in the suit filed by the Hendersons against Mills, without making Mrs. Brown, now Hare, a party thereto, coupled with acts thereafter on the part of the Hendersons, beginning years afterwards, by paying the delinquent taxes and leasing a part of the land for oil, and selling a small amount of timber from the land, evidences notice to Mrs. Hare, then Brown, of an intention upon the part of the Hendersons to rescind the deed made by the Hendersons to Frank Mills.

The decision of the Circuit Court of Appeals is, therefore, arbitrary and contrary to the local law of Texas, and in conflict with the opinion of the Supreme Court of Texas, by Chief Justice Cureton, in the case of Cathey v. Weaver, supra, directly and authoritatively construing said statute; and by such arbitrary construction of this statute by the Circuit Court of Appeals Mrs. Hare has been denied her property rights, contrary to the local law of Texas and its uniform and repeated construction by the Supreme Court of Texas.

IV.

The Circuit Court of Appeals has erred in its opinion in holding that the limitation statute of 1913 "did not destroy the vendor's superior title to prevent his effective rescission of it by rescission against his vendee's default, and particularly against his abandonment;" and

in holding that the lower court "expressly approved and reaffirmed the long and unbroken line of decisions affirming the vendor's right of protection by a timely rescission against a defaulting vendee, and his successor in title. Bunn v. City of Laredo; Benn v. Security, Realty & Development Co. note, supra."

Neither of these cited decisions touched the question here involved, because in both of these cases, by the terms of the deeds, no title, legal or equitable, was passed to the vendees therein; but by the terms of such deeds merely an equitable right on the part of the vendees to acquire title upon the performance of the express precedent condition that they pay off and discharge the vendor's lien notes. This right of contract on the part of the vendor, to retain all title to the land, was inviolate under the state and national constitutions, and could not be affected by the limitation statute of 1913, as decided in the opinion of the Commission of Appeals of Texas in the cited case of Bunn v. City of Laredo, 245 S. W., page 426, and as expressly held by the Supreme Court in that identical case; and the Circuit Court of Appeals in its opinion has erred in ignoring and refusing to observe this distinction. And in so doing, has deprived Mrs. Hare of her property rights contrary to the local law of Texas and its uniform construction by the Supreme Court of Texas.

ASSIGNMENT OF ERRORS.

In addition to the four preceding grounds for granting the writ, which are adopted as assignments of error, the following additional assignments of error are requested to be passed upon and determined by this court:

FIRST:

The Circuit Court of Appeals erred in not reversing the judgment of the trial court and rendering judgment for petitioners, because the deed from Mills to Mrs.

Brown, now Hare, dated October 24, 1902, conveyed the legal title to this land to her without any assumption on her part of the debt of Mills, but subject to enforcement of the vendor's lien against the land. And when Mills' obligation was allowed to lapse for non-payment, without any extension on his part of the payment of the obligation, the title held by Mrs. Hare could not be affected after the note became barred by limitation. The only remedy under the facts as against this land for the enforcement of Mills' obligation, was to bring suit to recover the land from her and not Mills. And since the statute of 1913 limited the right to proceed against her to twelve months from the passage of that act, and no suit was brought against her within such time, the superior title of the vendor and the right of rescission was thereafter forever extinguished.

SECOND:

And in the event only that the above and foregoing assignments of error are by the court overruled, then, in the alternative, petitioners assign as error the action of the Circuit Court of Appeals in denying to them the right either to pay off the vendor's lien notes or have an adjustment of equities therein set forth and to pay such amount, if any due, as a condition precedent to and right to recover.

Conclusion.

Wherefore, your petitioners respectfully pray that the writ of certiorari issue to the United States Circuit Court of Appeals, for the Fifth Circuit, at New Orleans, Louisiana, in this case, commanding that court to certify and to send to this court for review a full and complete

transcript of the record and proceedings in cause No. 9462, styled Clara E. Hare, *et al.*, appellants, vs. Allen W. Henderson, *et al.*, appellees; and that the judgment of said Circuit Court of Appeals, and of the trial court, be reversed and rendered in favor of your petitioners as prayed for in said Circuit Court of Appeals.

Your petitioners pray for such further and other relief in the premises as this Honorable Court may deem just.

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NOTE: Ten copies of petitioners' brief in the Circuit Court of Appeals, are filed as exhibits to this petition. They contain the Texas Statutes and their full and complete construction by the State Supreme Court, effectively and arbitrarily denied to these petitioners in this case.